- BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: March 4, 1998
Case No: 97-INA-00200

In the Matter of:

INTERSERVE GROUP
Employer

On Behalf of:

EIMEE T. AGUILAR
Alien

Appearance: Madeline C. Cronin, Esq.
for the Employer and the Alien

Before: Holmes, Jarvis and Vittone
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Eimee T. Aguilar ("Alien") filed by Employer Interserve Group ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment

service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On January 19, 1995, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Accountant in its Interior services to the Hotel Industry company.

The duties of the job offered were described as follows:

"Direct implementation of a general accounting system for keeping accounts and records of disbursements, expenses, tax payments, assets and income collection into the general ledgers. Prepare monthly profit and loss statements and balance sheets to reflect company's assets, liabilities and capital. Maintain payroll records. Responsible for timely and accurate filing of quarterly and annual tax returns and tax-related papers; Perform internal auditing of company financial records and prepare schedules and reports. Assist management in formulating and updating of budget, and perform comparison with actual figures and variance analysis; Responsible for updating/maintaining accounts receivables and payables and for making payments to suppliers and collections from debtors."

A Bachelor's degree with major field of accounting/commerce and 3 years experience in the job were required. Special requirements were: experience must include use of IBM pc & 10 Key-by-touch; test will be given to verify ability to perform job duties. Wages were $2,723.65 per month. The applicant would supervise 0 employees and report to the President. (AF-161-512) 34 applicants were referred by the Job Service.

On May 25, 1995, the CO issued a NOF denying certification. The CO found that Employer may have violated 20 C.F.R. 656.21(b)(2)(I)(A) in that the requirement of an accounting test was unduly restrictive. Additionally alien did not appear to have passed this test when she was hired. Corrective action was demonstration that the test was based on business necessity. Secondly, the CO found the combination of accountant/auditor may have been an unlawful combination of duties. Thirdly, the CO, noting 34 applicant referrals found insufficient evidence that Employer had timely contacted qualified applicants Long, Parker, Bhate, and Pelligrino, and that Chappetta, Perez and Shah had been contacted at all, evidencing a lack of good faith recruitment effort. (AF-155-159)

Employer, June 29, 1995, forwarded its rebuttal, stating that

Employer's test was a legitimate examination aimed at testing the basic requirements for the position. Employer, further alleged that applicants Zayas, Garcia, Ibrahim, Seitsinger, Meir and Perry were unable to pass the legitimate test designed to confirm the applicants required experience for the position. Employer contended applicants Fischler, Galuzzi, Conway, Marbun, Dale, Ames, D'Assumpcao, Carson and Rand were not qualified based on their resume, usually because they did not have the requisite Bachelor's degree in accounting. Applicant Pellegrino declined the offer to interview, and applicants Long, Parker, Perez, Shah, Bhate and Chiappetta were not contacted because the EDD's referral did not provide Employer with their phones and addresses.(AF-39-154)

November 8, 1995, the CO issued a Final Determination, denying labor certification. The CO found that the with respect to the test given, while Employer had submitted a copy of the test, Employer "...did not respond to the NOF concerns about origin of the test and applicants being advised they needed to take a test at interview. You have not shown your test to be an objective measure of the qualification of U.S. applicants." Secondly, documentation as required by the CO as to the combination of duties was not acceptable to the CO. Finally, the CO stated: "NOF determined that 16 applicants had not been given specific job related reasons for being rejected. You iterated your statements about their not meeting your job and test requirements that have been found restrictive elsewhere in this notice. You have not given valid, job-related reasons for rejecting these applicants." (AF-37,38)

Employer appealed, December 9, 1995 (AF-1-36)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for job-related reasons. Employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. H.C. LaMarche Ent.,Inc. 87-INA-607 (1988).

We believe the CO was correct in denying certification on the basis that employer had not directly rebutted the CO's allegation that a number of applicants were qualified and rejected. In that connection, while the CO incorrectly found that Employer had not submitted evidence of how the test he submitted was originated (Employer alleged it was developed by a manager in its accounting

department) (AF-15) this is harmless error, since we find that the test was not demonstrated to be objective. As an example, initial suspicion is raised by the wide discrepancy in test scores between Ms. Aguilar and the other test results, the highest of which appears to be that of Mohamed Ibraham, an applicant with an accounting degree and over 20 years experience in the field. Mr. Ibraham finished with a score of 20.4% whereas Ms. Aguilar finished with a 95% score even though she left blank the last (10th) question. Secondly, not all the test results from the applicants who had bachelor in accounting degrees (above) were submitted. While Employer alleges that Ms. Aquilar submitted the test prior to her hire, there is no demonstration that such test was administered to others at that time. More importantly, the test results submitted are entirely too good to not raise suspicions as to the independence of the taker. While other more experienced applicants made computations in a scribbled manner, Ms. Aguilar's were so impeccably neat and clean as to cause wonder as if they were being copied. We further note that the test taker gave a heading at one time of "E.T. Aguilar" and at another "Eimee Aguilar", that date of test is listed as "9/1/92" on all but one test sheet which is listed as "Sept. 01, 92" and that the answer given to question 2 has a "slash" through the "7", whereas the computation done does not have such slash in the "7". We take notice that such inconsistencies are not commonplace when an individual takes a test. The combination of all these factors in addition to the seeming complexity and ambiguities raised in the test questions, which, as Employer acknowledges, was created by his employee rather than a standardized accounting test, leads us to the conclusion that the CO was correct in finding that the test was not an objective one.

Thus this case can be distinguished from that cited by Employer, A to Z Vending Services Corp., 91-INA-14 (1993). In that case the Board found that tests may be reasonable when they test whether or not the applicant has substantive knowledge requisite to fill the job. Although an Employer may in some circumstances, use a test, or questionnaire, to ascertain the extent of claimed experience, this is not permissible when used as a means of discriminating against U.S. workers. MITO, 90-INA-295 (Sept. 11, 1991); South of France Restaurant , 89-INA-68 (March 26, 1990). Employer appears to have used the test to screen out otherwise qualified U.S. workers. Since Employer has not rebutted this finding, it is grounds for denial. The other matters found by the CO need not be discussed.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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JOHN C. HOLMES

Administrative Law Judge

BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date:
Case No: 95-INA-286

In the Matter of:

M.K. DESIGNERS, INC.
Employer

On Behalf of:

SETRAK MERACHIAN
Alien

Appearance: Baliozian & Associates
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Setrak Marachian ("Alien") filed by Employer M.K.Designers, Inc. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On April 15, 1993, the Employer filed an application for labor certification to enable the Alien, a Lebanese national, to fill the position of Wood Machinist in its cabinet and furniture manufacturing and construction company.

The duties of the job offered were described as follows:

> Responsible for set up and operation of woodworking machinery for fabrication of doors, windows, cabinets, and fine furniture. Operate power saws, drills, drill presses,

sanders, tenoner, mortising machine, boring machine, router,and hand tools. Prepare parts according to specifications. Follow intricate design specifications for furniture orders.

No educational requirements and two years experience in the job were required. Wages were $640.00 per week. (AF-25-53)

On June 22, 1994, the CO issued a NOF denying certification, finding that a U.S. applicant, Kenneth R. Pruett was unlawfully rejected. Employer alleged in his undated recruitment results report that applicant Pruett had stated the job site was too far. In a signed questionnaire from Mr. Pruett, he stated that he would not have turned down a job for $16.00 per hour, indeed, that he would have gone to Chicago or New York for that money. He further stated that he received a phone call from a woman who asked him if he could do carvings. She also asked if he could speak Farsi. The woman told him he was not qualified and hung up.(AF-21-23)

Employer, June 29, 1994, forwarded its rebuttal, stating: "As Mr. Pruett stated to you in his questioneer, Mrs. Keuroghlian asked the applicant if he had experience doing wood carving, using the specialized equipment and hand tools as was required in the job description, to construct some of the more intricate detail designs on furniture and cabinets. He responded that he was not able to do carvings. It was based upon this response that he was told that he was probably not qualified. Mr. Pruett also stated to Mrs. Keuroghlian that the job site in Glendale was too far to come for a job." (AF-9-20)

On August 23, 1994, the CO issued a Final Determination denying certification since Mr. Pruett as a master carpenter according to his resume who owned and operated a custom cabinet shop was qualified for the job opportunity. The fact that he cannot do carvings with chisels is not pertinent since the duty was not listed on the ETA 750A form. (AF-6-8)

On September 7, 1994, Employer filed a request for review and reconsideration of Final Determination. (AF-1-5)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for job-related reasons. Employers are required to make a good-faith effort to recruit

qualified U.S. workers for the job opportunity. H.C. LaMarche Ent.,Inc. 87-INA-607 (1988). As a general matter, an employer unlawfully rejects an applicant where the applicant meets the employer's stated minimum requirements, but fails to meet requirements not stated in the application or the advertisements. Jeffrey Sandler, M.D., 89-INA-316 (Feb.11, 1991)(en banc).

We find the CO was correct in finding that the rejection of Mr. Pruett was unlawful, in that he appeared well qualified for the position and expressed an interest in accepting same. Employer's reason for rejection was that applicant was not familiar with a hand chisel, a duty that was not set out in the job requirement and would not appear to be accurate, given his long and intimate experience in the field. Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he or she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. Gorchev & Gorchev Design, 89-INA-118 (Nov. 29, 1990)(en banc).

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge